Office-Supreme Court, U.S.
FILED
DEC 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF SOUTH CAROLINA, et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION OF FEDERAL RESPONDENTS

DANIEL R. McLEOD
Attorney General
FRANK K. SLOAN
Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211
THOMAS C. DORSEY
Vice President and
General Counsel
The American Short Line
Railroad Association
2000 Massachusetts Avenue, N.W.
Washington, D.C. 20036
PETER A. GREENE
(Counsel of Record)
Thompson, Hine and Flory
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800
Counsel for Petitioners

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

TABLE OF AUTHORITIES

Cases: **Page**

Remittance of Demurrage Charges, 353 ICC 567 (1977) 2

Virginia Blue Ridge Railway v. *Southern Railway Company*, 96 ICC 591 (1925) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-516

STATE OF SOUTH CAROLINA, et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION OF FEDERAL RESPONDENTS

Petitioners believe that the brief in opposition of the federal respondents presents a generally fair, accurate and balanced statement. It is with respect to only one point that petitioners feel obliged to respond. That point is one which brings into focus the conflict which is at the basis of this litigation.

At page six of their brief in opposition federal respondents state as follows:

> ". . . petitioners argue that the terminal carrier's expenses entitle it to keep the elevator's demurrage payments. The Commission addressed and

> rejected this argument because it found that the terminal carrier, unlike the line-haul carriers, can at least theoretically recover its expenses by raising its switching charges."

This statement epitomizes the basic defect in the reasoning of the ICC which caused it to reverse the decisions of its Administrative Law Judge and its Review Board which applied the well-established policy that the carrier on whose lines cars are detained is entitled to demurrage charges accruing as the result of such detention. Essentially the ICC decided that, in balancing the need of the Port Terminal Railroad of South Carolina ("PTSC") to recover the costs concededly incurred in holding cars on its line and the needs of the line-haul carriers to recover the costs of ownership of the cars, PTSC is in a better position than the line-haul carriers to make up for any revenue shortfall by other means. This conclusion ignores the fact that any revenue shortfall of the line-haul carriers (even assuming that it may exist) is a situation of their making and a situation to which, contrary to the basic premise of the ICC decision, the line-haul carriers are in a better position to respond than is PTSC.

It is well-recognized that car ownership costs are a basic ingredient of line-haul rates.[1] This includes the cost of owning cars while they are moving under load, their empty return movement and anticipated idle time at origin and

---

[1]See, for example, *Virginia Blue Ridge Railway* v. *Southern Railway Company*, 96 ICC 591, 594 (1925) in which the ICC observed that: "Car-ownership cost is one of the transportation costs which should be considered in connection with the portion of the transportation performed by the independent line-haul carrier when fixing its division of the through rate." More recently, in *Remittance of Demurrage Charges*, 353 ICC 567, 591 (1977) the ICC expressly recognized that: "Per diem expenses are also used in computing the line-haul rate."

destination while awaiting loading and unloading. The latter factor is included on the assumption that a car normally will be at destination for up to five days since that is the period for which the line-haul carriers, on their own initiative, have determined to provide for reclaim by the terminal carrier of charges intended to compensate for car ownership costs (i.e., per diem).[2] The line-haul freight rates were established with full knowledge of the preexisting per diem reclaim commitments. Thus, the line-haul carriers are already receiving, as an element of their line-haul rates, compensation for ownership of their cars while they are in revenue service including a five day unloading period at destination during which per diem is subject to reclaim.

If the line-haul carriers have miscalculated their revenue requirements in establishing their line-haul rates, it is within their exclusive province to make appropriate adjustments to their line-haul rates. Furthermore, it is appropriate that they should be the ones to make the adjustments since it is they who made the miscalculation. What is not proper and not appropriate is what they have done here – namely take from PTSC demurrage charges which PTSC must have in order to cover the cost of holding cars.

The ICC decision is based on the erroneous assumption stated in the brief in opposition of federal respondents that PTSC can make up for this expropriation in that it ". . . can *at least theoretically* recover its expenses by raising its switching charges." [emphasis added]. This assumption is simply not correct – not even "theoretically". Ex-

[2]Beyond that five day period, PTSC can and does compensate the line-haul carriers for their car ownership costs by payment of per diem charges which are not subject to reclaim.

cessive switching charges intended to compensate PTSC for services normally paid for by demurrage charges would place Charleston at a competitive disadvantage with other ports and thus does not represent a realistic course of action. Moreover, it is a solution which would be fundamentally inequitable in that it would improperly penalize innocent parties in order to compensate for miscalculations by the line-haul carriers of their line-haul rates. It would impose upon shippers who handle cars promptly the burden of costs generated by shippers who do not unload and release cars promptly. As petitioners observed in their petition for writ of certiorari, such an arrangement would be the very antithesis of the concept of just, reasonable and non-discriminatory treatment of shippers which is the very foundation of the Interstate Commerce Act.

If the line-haul carriers have made a mistake in calculating their line-haul rates at a level sufficient to properly reflect pre-existing per diem reclaim agreements, they should correct that error rather than force PTSC to commit another wrong by improperly penalizing shippers for costs for which they have no responsibility. Succinctly stated, two wrongs don't make a right. Yet, the ICC decision and its argument to this Court are grounded squarely on the contention that they do. Therefore, it is not a reasonable or rational determination.

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

STATE OF SOUTH CAROLINA
SOUTH CAROLINA PUBLIC
RAILWAY COMMISION

DANIEL R. McLEOD
Attorney General

FRANK K. SLOAN
Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211

THOMAS C. DORSEY
Vice President and
General Counsel
The American Short Line
Railroad Association
2000 Massachusetts Avenue, N.W.
Washington, D.C. 20036

PETER A. GREENE
(Counsel of Record)
Thompson, Hine and Flory
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Counsel for Petitioners